United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2257

To be argued by
V. THOMAS FRYMAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2257

UNITED STATES OF AMERICA,
Appellee,

—v.—

HENRY JENKINS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2257

UNITED STATES OF AMERICA,

Appellee,

—v.—

HENRY JENKINS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

PRELIMINARY STATEMENT

Henry Jenkins appeals from a judgment of conviction entered on September 11, 1974, in the United States District Court for the Southern District of New York following a three day trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 74 Cr. 261, filed March 18, 1974, charged Jenkins in sixteen counts with possession of stolen mail (18 U.S.C. § 1708). On June 13, 1974, a jury trial began, and the District Court granted the Government's motion to dismiss Counts 13 and 16; on June 14, 1974, the Court granted Jenkins' motion for a mistrial after the jury reported that it was unable to reach a verdict. On June 17, 1974, a second jury trial began; on June 19, 1974, the jury returned a verdict of guilty on Counts 4, 5, 6, 10, 11 and 14 and not guilty on Counts 1, 2, 3, 7, 8, 9, 12 and 15.

On September 11, 1974, Judge Gagliardi sentenced Jenkins to concurrent terms of six months imprisonment, to be followed by three years probation.

Jenkins is now free on bail pending appeal.

STATEMENT OF FACTS

A. The Government's Case.

The Government's case consisted of Jenkins' statement, Government Exhibit 17, concerning the offenses charged in the indictment; testimony by two postal inspectors, Warren Monroe and Frank Gonzalez, about Jenkins' statements to them; the City of New York Department of Social Services checks contained in the letters referred to in the indictment; and a stipulation between counsel that, if called, a representative of the Department of Social Services would testify that those checks were mailed in the ordinary course of business and that the payees of the checks would testify that they never received them.*

The written statement signed by Jenkins said that the checks "were given to me by a person who works for the Post Office, and who I know as Big Man" on or about April 16, 1973. Jenkins then gave the checks—"knowing the same to have been stolen"—to Vincent Cartiglia. The statement continued:

> "A couple of hours later, Vinnie would give me approximately half of the face value of the checks. I, in turn, gave Big Man the money and Big Man would give me approximately 1/5 of what he received for the checks. I received approximately 30 to 40 checks which were given to me each check day from Big Man." (GX 17).

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* There was no stipulation as to testimony by the payees of the checks involved in Counts 13 and 16. As noted above, those two counts were dismissed on motion of the Government.

In that written statement Jenkins said that Cartiglia was "a major fence and I worked as the middleman supplying him with checks." At the trial Inspectors Monroe and Gonzalez testified in detail about what happened from the time Jenkins was arrested until the time he signed Government Exhibit 17.

Inspector Monroe, when he arrested Jenkins, told him

> "that anything he said could be used against him in court, that he had the right to have an attorney present before any questions were asked of him, and if he should decide to answer questions at that time without an attorney he also had the right to stop answering at any time." (Tr. 23).*

In advising Jenkins of his constitutional rights at that time, Inspector Monroe did not read from anything and he did not ask Jenkins to sign anything. He asked Jenkins if he understood his rights and Jenkins said, "Yes." (Tr. 23). Inspector Monroe then took Jenkins by car to the Post Office where they went into one of the Inspection Service offices (Tr. 24-25). At that time Inspector Monroe told Jenkins that he wanted to speak to him about some stolen checks but that he first wanted to advise him again of his constitutional rights (Tr. 25). He read to Jenkins the statements on the "Warning and Waiver" form and then asked Jenkins to read the "Warning and Waiver" form to himself; Jenkins said he could not read (Tr. 25). Inspector Monroe asked Jenkins if he understood the rights which were set forth in the "Warning and Waiver" form; Jenkins said that he did (Tr. 26). He asked Jenkins if he would like to sign the "Warning and Waiver" form; Jenkins said that he would (Tr. 26-27; GX 2).

Inspector Monroe then showed Jenkins twelve checks which contained second endorsements in the name of "William Courtrayer". Jenkins denied that he had given

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* Numbers preceded by "Tr." refer to pages of the transcript of the June 17-19 trial.

any of those twelve checks to William Courtrayer or that he had ever previously seen any of those checks (Tr. 27-28). After he had reviewed the Courtrayer checks with Jenkins, Inspector Monroe left the room (Tr. 29).

Inspector Gonzalez then went into the room where Jenkins waited taking with him about forty City of New York Department of Social Services checks which contained the endorsement "Carter Counseling Service" and the initials "HJ" written on the lower left-hand corner (Tr. 118-19). Inspector Gonzalez showed Jenkins those checks, one at a time; from that group of forty checks Jenkins identified fourteen—Government Exhibits 3 through 16—as "the ones which he had received from Big Man and given to Cartiglia." (Tr. 120-21). Jenkins placed his initials and the date of the interview, 12/4/73, on each of the fourteen checks he identified (Tr. 121-22).

At that time Inspector Monroe re-entered the room, and Inspector Gonzalez gave him the fourteen checks which Jenkins had identified and initialed (Tr. 30-32). Inspector Monroe showed each check to Jenkins, and Jenkins said that he had given those checks to Cartiglia (Tr. 32). Jenkins told Inspector Monroe that he had received the checks from a person named Big Man:

> "He said that Big Man—or he thought Big Man worked in the Post Office, that Big Man brought these checks, various checks, each check day, that he would take the checks to Vinnie, or Vincent Cartiglia, and Vinnie would give him half of the proceeds from the checks and that he would return the money to Big Man, and Big Man would give him a fifth of what he received." (Tr. 32-33).

Inspector Monroe then asked Jenkins "if it would be agreeable to him to dictate jointly with him a statement to the secretary and prepare a written statement, and he said

yes." (Tr. 35). Inspector Monroe called a secretary into the room, and he gave the following description of the procedure they used to prepare the statement:

> "Well, the secretary came in then. She sat on one side of the desk. Mr. Jenkins was on the other, and I was sitting behind the desk, and I told Mr. Jenkins that we would give a statement and that anything in this statement that wasn't correct, that he was to stop me and correct it. If there was anything he wanted to put in the statement to so advise me.
>
> And we proceeded to dictate the statement to the secretary, and I told the secretary, I says, 'We will do it in the following manner,' I says. 'It will start out, "My name is Henry Jenkins. I am" '—I asked Mr. Jenkins, 'How old are you?' He said, 'Forty-five,' and I told her, 'Okay, forty-five.' And we proceeded to take the statement in that manned." (Tr. 36).

The secretary typed the statement dictated by Inspector Monroe and Jenkins on an affidavit form which contained a printed first paragraph concerning the advice of constitutional rights previously given to Jenkins by Inspector Monroe (Tr. 37). Inspector Monroe then read the entire typed statement to Jenkins—word by word—and asked him "if there was anything in it that he did not agree with or he wanted to change." (Tr. 38). Jenkins did not make any changes, and he signed the statement, Government Exhibit 17 (Tr. 38).

B. The Defense Case.

Jenkins offered no evidence in his defense.

ARGUMENT

POINT I

The District Court did not commit reversible error with respect to venue.

Jenkins' principal point on appeal is that the District Court committed reversible error by failing to submit the issue of venue to the jury. We respectfully submit that this contention is without merit because (1) venue is not an issue for the jury; (2) nevertheless the District Court charged the jury on venue; (3) Jenkins did not request any proper charge on venue; and (4) any omission in the charge was harmless error.

A. Proceedings Below.

With respect to Jenkins' possession of the stolen checks in the Southern District of New York, Jenkins' admission to the Postal Inspectors stated that he was the owner of Henry's Luncheonette, located at 381 Lenox Avenue, and that he gave the stolen checks to Vincent Cartiglia "who operated a Meat Market located on Lenox Avenue, between 128th and 129th Streets." (GX 17). The testimony of Inspectors Monroe and Gonzalez showed that Jenkins' establishment and Cartiglia's meat market were both located in Manhattan. Inspector Monroe testified that Jenkins was arrested at Henry's Luncheonette which was located between 129th and 130th Streets on Lenox Avenue in Manhattan, and Jenkins told Gonzalez that Cartiglia worked in a meat market a block away from his luncheonette (Tr. 22, 120).

Jenkins in his interview with Inspector Monroe stated that he delivered the stolen checks to Cartiglia: Jenkins said that "he would take the checks to Vinnie, or Vincent Cartiglia, and Vinnie would give him half of the proceeds from the checks" and that "when he took the check to

Vinnie he gave them to him and he stood there while Vinnie wrote the red HJ on the lower left-hand corner." (Tr. 33, 101). In the interviews with Inspectors Monroe and Gonzalez Jenkins repeatedly identified Cartiglia with one location—the meat market. Inspector Monroe testified:

> "I asked Mr. Jenkins when we were sitting there, he referred to Vincent Cartiglia as Vinnie. I said, 'Who's Vinnie?'
>
> 'He runs a meat market.'
>
> I asked him, 'Where is the meat market?'
>
> He told me where the meat market was." (Tr. 108).

Inspector Gonzalez testified:

> "I asked Mr. Jenkins did he know a Vincent Cartiglia. He said yes, he knew Vinnie as Vinnie, who worked in a meat market on the next block from where his place where he was arrested at." (Tr. 120).

The stolen checks admitted into evidence (GX 6-8, 12, 13, 15) were all addressed to payees residing in Bronx, New York.

At the end of the entire case, Jenkins moved for a judgment of acquittal on the ground that "it is to be proven beyond a reasonable doubt that the crime alleged was committed in the Southern District of New York" and that the Government had failed to meet that burden (Tr. 158). The Court denied Jenkins' motion (Tr. 161). Jenkins' counsel then asked the Court to instruct the jury that it must find "beyond a reasonable doubt" that the crime was committed in the Southern District of New York (Tr. 161).

The Court declined to charge that venue must be found "beyond a reasonable doubt". In its charge the Court noted that the indictment was the "formal method of accusing a defendant of the crime charged" and thereafter read

to the jury "the parts of the indictment which are the charges in the indictment" including the allegation that Jenkins had possession of the contents of the stolen letters "in the Southern District of New York" (Tr. 207, 212). With regard to the Southern District of New York, the Court continued that "for our purposes the Southern District of New York encompasses Manhattan and Bronx Counties" (Tr. 212). The Court then elaborated on four elements of the crime charged in the indictment which the jury must find "beyond a reasonable doubt" before it could find Jenkins guilty on any count; venue was not included (Tr. 214-16). Jenkins' counsel took an exception to the Court's charge on venue because of the standard Judge Gagliardi used (Tr. 227).

B. Venue is not an issue for the jury.

At the trial below, Jenkins requested the District Court to charge the jury that the Government was obliged to prove venue in the Southern District of New York beyond a reasonable doubt (Tr. 161). The District Court properly refused to so charge, for the law in this Circuit is settled that "venue need not be proven beyond a reasonable doubt." *United States* v. *Catalano,* 491 F.2d 268, 276 (2d Cir.), *cert. denied,* 95 S. Ct. 42 (1974). Indeed, every other Court of Appeals which has considered the question has also rejected the position that venue must be proven beyond a reasonable doubt and instead has held that the proper standard of proof of venue is by a preponderance of the evidence. *United States* v. *Powell,* 498 F.2d 890 (9th Cir. 1974); *United States* v. *Luton,* 486 F.2d 1021 (5th Cir. 1973), *cert. denied,* 94 S. Ct. 2626 (1974); *United States* v. *Aldridge,* 484 F.2d 655, 659 (7th Cir. 1973), *cert. denied,* 415 U.S. 922 (1974); *United States* v. *Trenary,* 473 F.2d 680 (9th Cir. 1973); *United States* v. *Charlton,* 372 F.2d 663 (6th Cir.), *cert. deneid,* 387 U.S. 936 (1967); *Cauley* v. *United States,* 355 F.2d 175 (5th Cir.), *cert. denied,* 384 U.S. 951 (1966); *Hill* v. *United States,* 284 F.2d 754 (9th Cir. 1960), *cert. denied,* 365 U.S. 873 (1961); *Holdridge*

v. *United States*, 282 F.2d 302, 305 (8th Cir.1960); *Dean* v. *United States*, 246 F.2d 335, 338 (8th Cir. 1957); *Blair* v. *United States*, 32 F.2d 130, 132 (8th Cir. 1929).

While Jenkins in his Brief on appeal still seems to argue that the jury should have been instructed to find venue beyond a reasonable doubt,* his principal contention now seems to be that the District Court committed error in failing "to instruct the jurors that they had to find as a fact" that the offenses charged were committed in the Southern District of New York (Br. at 8). While concededly the Government has the burden of establishing by a preponderance of the evidence that venue for the offenses charged lay in the Southern District of New York, nevertheless we submit that the issue of venue should be one for the Court and not for the jury.

In asserting that venue is a jury question, Jenkins relies at pages 9-10 of his Brief on three Second Circuit decisions: *United States* v. *Jones*, 480 F.2d 1135 (2d Cir. 1973); *United States* v. *Provoo*, 215 F.2d 531 (2d Cir. 1954); and *United States* v. *Gillette*, 189 F.2d 449 (2d Cir.), *cert. denied*, 342 U.S. 827 (1951). *Jones* in no way determines whether venue is a jury question, for it involved a prosecution under 18 U.S.C. § 661 for an offense "within the special maritime and territorial jurisdiction of the United States", and this Court merely held that one of the elements of a charge laid under that statute—"whether an offense is committed within or without a jurisdictional boundary"—was a "factual issue which should be submitted to the jury". 480 F.2d at 1138. *Provoo* likewise did not hold that a jury must determine venue, but rather discussed whether, in the light of newly discovered

* At page 11 of his Brief, Jenkins cites three cases from this Circuit and, in a footnote, suggests that there are other Circuits "which depart from this rule and specify that venue need not be proved beyond a reasonable doubt".

evidence, it would be possible to find venue in the Southern District of New York.

In *Gillette,* this Court did hold that the trial judge had committed error in failing to submit the issue of venue to the jury, although it affirmed the conviction finding the error harmless. 189 F.2d at 452. The Court's stated reason for its conclusion that venue is for the jury was simply that "under the Sixth Amendment proof of venue is an indispensable part of the prosecution's case." *Id.* But the obligation on the prosecution to establish venue does not require that the issue of venue be determinded by the jury.* In support of its holding, the Court relied on four decisions: *United States* v. *Zeuli,* 137 F.2d 845 (2d Cir. 1943); *Moran* v. *United States,* 264 F. 768 (6th Cir. 1920); *United States* v. *Jones,* 174 F.2d 746 (7th Cir. 1949); and *United States* v. *Johnson,* 323 U.S. 273 (1944). But none of those four cases stands for the proposition that the issue of venue is one for the jury; indeed, *Jones* was an appeal from a conviction after a bench trial. In short, the holding in *Gillette* does not follow either from the reasoning upon which it depends or the cases upon which the Court relied. In the twenty-three years since *Gillette* was decided, it has apparently never been cited for the proposition upon which Jenkins relies.

Jenkins also states (Br. at 10) that other Circuits have "acknowledged" that venue is a question of fact for the jury. In five of the six cases Jenkins cites—*United States* v. *Lukasik,* 341 F.2d 325 (7th Cir.), *cert. denied,* 381 U.S. 938 (1965); *Weaver* v. *United States,* 298 F.2d

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* It is of course not true that every "indispensable part of the prosecution's case" must be determined by the jury. For example, in perjury cases, the Government must establish materiality. That issue, however, is for the Court, not the jury. *E.g., Urited States* v. *Mancuso,* 485 F.2d 275, 280 (2d Cir. 1973).

496 (5th Cir. 1962); *Hill* v. *United States,* 284 F.2d 754 (9th Cir. 1960), *cert. denied,* 365 U.S. 873 (1961); *Holdridge* v. *United States,* 282 F.2d 302 (8th Cir. 1960); and *Dean* v. *United States,* 246 F.2d 335 (8th Cir. 1957)—the question on appeal was the sufficiency of the evidence to support a finding of venue. There is no holding in any of these opinions that venue must be submitted to the jury; the opinions merely note that the trial judges had done so.* In the sixth case Jenkins cites—*Green* v. *United States,* 309 F.2d 852 (5th Cir. 1962)—the Court did hold that it was error not to submit the question of venue to the jury, apparently on a "beyond a reasonable doubt" standard. *Id.* at 853, 857. The continued viability of that holding, however, is substantially undercut by later Fifth Circuit decisions rejecting the reasonable doubt standard for venue. *E.g., United States* v. *Luton,* 486 F.2d 1021 (5th Cir. 1973), *cert. denied,* 94 S. Ct. 2626 (1974). Moreover, *Green's* force as precedent for the proposition that venue is a question for the jury is weak not only because the Court cited no relevant authority whatever in support of its holding, but also because it did not even give any reason for the conclusion reached.

But for this Court's holding in *Gillette* and the Fifth Circuit's holding in *Green,* there is simply no authority properly cited by Jenkins for the proposition that venue is a jury question. As noted, neither *Gillette* nor *Green* cites relevant precedent for its holding. The absence of such precedent arises, we submit, because *Gillette* and *Green* were wrongly decided.

As Jenkins correctly points out, the right to trial in the State and judicial district where the offense is charged to have been committed as guaranteed by Article III, Section 2, and by the Sixth Amendment of the United States Constitution. It is likewise prescribed by Rule 18 of the

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* Similarly, *United States* v. *Rodriguez,* 465 F.2d 5 (2d Cir. 1972), merely assumed without discussion that venue is a jury question.

Federal Rules of Criminal Procedure. But neither the Constitution nor Rule 18 suggests, much less provides, that it is for the jury to determine whether that Constitutional and procedural right has been accorded. The Fourth, Fifth and Sixth Amendments of the Constitution provide a number of other safeguards besides venue: for example, protection from unreasonable searches and coercive interrogations; indictment by a Grand Jury; and protection from double jeopardy. Jenkins can hardly contend that the Constitution requires a jury determination with respect to those safeguards, even in their factual aspects.

Similarly, nothing in the Constitutional guarantee of a jury trial presupposes that an accused is entitled to have a jury pass on whether proper venue has been laid. That guarantee can mean no more, and sometimes means less, than that a defendant is entitled to the jury's consideration of each element of the crime charged. *United States* v. *Fields,* 466 F.2d 119, 121 (2d Cir. 1972). But venue is "not an integral part of a criminal offense", *Holdridge* v. *United States,* 282 F.2d 302, 305 (8th Cir. 1960), and venue, while it must be proved, need not even be pleaded in the indictment. *Carbo* v. *United States,* 314 F.2d 718, 733 (9th Cir. 1963), *cert. denied,* 377 U.S. 953 (1964).

Moreover, the holding in *Gillette* that a defendant is entitled to have the jury pass on venue as if it were an element of the crime is substantially undercut by more recent holdings in this Circuit on the law of venue. It is settled in this Circuit that a claim of improper venue may not be made if the defendant goes to trial on an indictment which discloses improper venue on its face, or if the defendant fails to move for a judgment of acquittal, specifying improper venue or inadequate proof of venue, at the close of the Government's case. *United States* v. *Rivera,* 388 F.2d 545, 548 (2d Cir.), *cert. denied,* 392 U.S. 937 (1968); *United States* v. *Gross,* 276 F.2d 816, 818-19 (2d Cir.), *cert. denied,* 363 U.S. 831 (1960); *United States* v. *Broth-*

man, 191 F.2d 70 (2d Cir. 1951). *See generally United States* v. *Price*, 447 F.2d 23, 27 (2d Cir.), *cert. denied*, 404 U.S. 912 (1971). *See also United States* v. *Jackson*, 482 F.2d 1167, 1179 (10th Cir. 1973), *cert. denied*, 414 U.S. 1159 (1974); *United States* v. *Dryden*, 423 F.2d 1175, 1178 (5th Cir.), *cert. denied*, 398 U.S. 950 (1970); *Harper* v. *United States*, 383 F.2d 795 (5th Cir. 1967). Indeed, it seems established that if the impropriety of venue becomes manifest at trial prior to the end of the Government's case, a defendant who waits until the conclusion of the Government's proof to claim improper venue forfeits his right to make such a claim. *United States* v. *Greenberg*, 268 F.2d 120, 123 (2d Cir. 1959); *United States* v. *Miller*, 246 F.2d 486 488 (2d Cir.), *cert. denied*, 355 U.S. 905 (1957). In fact, *United States* v. *Fabric Garment Co.*, 262 F.2d 631, 641 (2d Cir. 1958), *cert. denied*, 359 U.S. 989 (1959), suggests, without qualification, that in such a situation a motion directed to venue at the close of the Government's case comes too late.*

This line of authority is wholly inconsistent with the claim Jenkins asserts—that a defendant is entitled to take venue to the jury. Rather these cases support the wholly unremarkable notion that venue goes only to the proper site for the trial, a matter for judicial determination generally before trial, and not to the finding of guilt or innocence, which is the jury's function. Venue, which is clearly not an element of a crime, simply has nothing to do with guilt or innocence. If it were otherwise, there would be no reason to hold that venue is waived if not timely asserted on motion for dismissal or acquittal, a requirement clearly inapplicable to the submission of the elements of the crime to the jury. Presumably the practice of submitting venue to the jury, to the extent that the practice

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* At the first trial Jenkins did not claim improper venue, but at the second trial he argued that venue "had not been proven the last time around." (Tr. 158). Jenkins' failure to move for a judgment of acquittal specifying improper venue at the close of the Government's case at the first trial was a waiver of any venue objection to prosecution in the Southern District of New York. *But cf. Jenkins* v. *United States*, 392 F.2d 303 (10th Cir. 1968).

exists, arose because a finding of venue turned on a determination of facts which were litigated at trial and perhaps in a few cases controverted. But there is nothing foreign to the judicial function of determining facts on the basis of evidence adduced in the course of a trial, particularly when a preponderance standard is used. *See, e.g., United States* v. *Geaney,* 417 F.2d 1116 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970). Similarly, the fact that the jury, applying a reasonable doubt standard, might later disagree with the trial judge is wholly unremarkable and commonplace. *See United States* v. *Zane,* 495 F.2d 683, 692-93 (2d Cir.), *cert. denied,* 95 S. Ct. 174 (1974).

Finally, we submit that there are substantial policy reasons which suggest that venue should not be a question for the jury. The requirement urged by Jenkins could create considerable confusion in the jury's deliberations. It is well established that the elements of a crime must be proven beyond a reasonable doubt. *E.g., In re Winship,* 397 U.S. 358 (1970). Likewise, as noted above, it is established in this Circuit and most other circuits that venue is to be determined by a different standard, preponderance of the evidence. If venue is a jury question and if this distinction is interpreted to require an explanation of preponderance of the evidence in the Court's charge, every jury in every criminal case must comprehend two separate burden of proof charges and apply one to venue and the other to the elements of the crime charged. While in some situations a jury may comprehend the distinction between two different standards of proof, *see United States* v. *Braver,* 450 F.2d 799, 804 (2d Cir.), *cert. denied,* 405 U.S. 1064 (1971), to require every jury in every criminal case to make that distinction would be an unsound judicial policy.* Questions of venue are mixed questions of law and fact frequently involving "judicial notice" that a particular location is within the district where the crime is being prosecuted. *See, e.g., United States* v. *Spagnuolo,* 168 F.2d 768 (2d Cir.), *cert. denied,* 335 U.S. 824 (1948).

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* See pages 15-16, *infra,* for a discussion of the District Court's charge here.

For the effective operation of the criminal process, presentation to a jury of such a circumscribed issue of fact requiring application of a different standard of proof makes no sense.*

C. The District Court charged the jury on venue.

In its charge the District Court read to the jury the indictment which it described as the "crime charged" and the "charges in the indictment", including the venue allegation that Jenkins had possession of the contents of the stolen letters "in the Southern District of New York", as well as the statutory elements of the crime of possession of stolen mail in violation of 18 U.S.C. § 1708. As for venue, the District Court further charged the jury that "for our purposes the Southern District of New York encompasses Manhattan and Bronx counties". As for the four statutory elements of the crime, the District Court further described each element and instructed the jury that it must find each element beyond a reasonable doubt for each count before it could convict on that count.

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* Jenkins notes in his Brief that his requested charge on venue "followed counsel's timely motion for a judgment of acquittal because the Government had failed to establish proper venue." (Br. at 10). He emphasizes in Point I that the Government did not introduce any "direct evidence" of venue and that the jurors would have to "infer" from the evidence that the crime occurred in the Southern District of New York (Br. at 8-9). It is well established that direct proof of venue is not required and that inferences of venue may be drawn from circumstantial evidence. *E.g., United States* v. *Aldridge*, 484 F.2d 655, 659 (7th Cir. 1973), *cert. denied*, 415 U.S. 922 (1974); *United States* v. *Trenary*, 473 F.2d 680 (9th Cir. 1973); *United States* v. *Gargiso*, 456 F.2d 584, 588 n.5 (2d Cir. 1972); *United States* v. *Mendell*, 447 F.2d 639, 641 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); *United States* v. *Graves*, 428 F.2d 196, 201 (5th Cir. 1970), *cert. denied*, 400 U.S. 960 (1970); *United States* v. *Luckenbill*, 421 F.2d 849 (9th Cir. 1970); *United States* v. *Hayutin*, 398 F.2d 944, 949 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968); *United States* v. *Charlton*, 372 F.2d 663 (6th Cir.), *cert. denied*, 387 U.S. 936 (1967); *Weaver* v. *United States*, 298 F.2d 496 (5th Cir. 1962).

If venue is a question to be determined by the jury, the charge as given was sufficient. The District Court instructed the jury that one of the charges in the indictment was that Jenkins had in his possession the contents of the letters in the Southern District of New York which included Manhattan and Bronx counties; any further explanation of venue would have been surplusage. As for burden of proof, the District Court's charge defined "beyond a reasonable doubt" and specified which of the charges of the indictment—the four statutory elements of the crime—had to satisfy that standard. The District Court's charge did not define a standard of preponderance of the evidence or specify that venue was to be determined by that standard. But an explanation of preponderance of the evidence would have been of no assistance to the defendant, while on the other hand two different instructions on burden of proof could easily have generated confusion as to the standard that had to be satisfied on the elements of the crime. The charge as given seems the most appropriate way to distinguish the standard of proof applicable to venue from the standard of proof applicable to the elements of the crime—if venue is to be a jury question.

D. Jenkins did not request any proper charge on venue.

While Jenkins now argues that the District Court erred in not charging the jury that they must "find as a fact" that the crime was committed in the Southern District of New York, the only charge Jenkins requested below was that venue must be established beyond a reasonable doubt, which the District Court properly refused and which Jenkins did not follow with a request in proper form. His complaint on appeal is foreclosed because "[i]f a proffered request is in any respect incorrect, the denial of such a request is not error." *United States* v. *Kelly,* 349 F.2d 720, 759 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966). *Accord, United States* v. *Billingsley,* 474 F.2d 63, 65 (6th Cir.), *cert. denied,* 414 U.S. 819 (1973).

E. Any omission in the charge was harmless error.

The evidence showed that the payees of the stolen checks all lived in Bronx, New York; that Jenkins owned a luncheonette in Manhattan; that Jenkins took the stolen checks to Vincent Cartiglia, who operated a meat market a block from Jenkins' luncheonette; that Jenkins identified Cartiglia with the meat market; and that Jenkins received money from Cartiglia for the checks a couple of hours later. There was no evidence in any way suggesting that Jenkins' possession of the stolen checks was in another judicial district. The fact that Jenkins returned two hours later to pick up the proceeds suggests strongly that the checks were cashed in the interim, implying that Jenkins' possession was during business hours and therefore in Manhattan. The Government clearly established venue in the Southern District of New York by a preponderance of the evidence, and any omission in the District Court's charge was harmless error. *See United States* v. *Gillette,* 189 F.2d 449, 452 (2d Cir.), *cert. denied,* 342 U.S. 827 (1951).

POINT II

The District Court's instruction on credibility of witnesses did not prejudice Jenkins.

Jenkins argues in Point II of his Brief that his conviction should be reversed because the District Court committed error in its instructions concerning credibility of witnesses. Specifically, the District Court told the members of the jury that, if they found that all or any part of a particular witness' testimony was false, they "may not of course infer that the opposite of that testimony is the truth unless there is other evidence to that effect" and that "a finding of fact may not be established merely by a negative inference arising from your disbelief and rejection of any testimony." (Tr. 220). No objection was made below to this instruction.

Jenkins claims that this instruction conflicts with this Court's decision in *Dyer* v. *MacDougall,* 201 F.2d 265 (2d Cir. 1952), which "explicitly rejected the theory that the trier of fact can be precluded from inferring, if it disbelieves a witness, the opposite of what the witness says" (Br. at 14). Jenkins notes that the only witnesses at the trial were Inspectors Monroe and Gonzalez and states that their testimony "was to establish that appellant, fully understanding his rights, knowingly waived them, and in response to interrogation gave a complete confession of his guilt"; in contrast the "defense theory" was that Jenkins failed to understand his rights and did not participate in any significant way in the preparation of Government Exhibit 17 (Br. at 12). Relying on *Dyer,* Jenkins continues that if the jury disbelieved Monroe and Gonzalez "appellant was entitled to have the jury infer, if it chose to do so, the opposite of what the inspectors asserted." (Br. at 15). Jenkins concludes: "Precluding the jury from doing so was fundamental error mandating reversal even absent objection." (Br. at 18).

Jenkins is certainly correct that as a general proposition a jury is entitled to draw a factual inference opposite to the testimonial assertions of a witness it disbelieves. *United States* v. *Tramunti,* 500 F.2d 1334, 1338 (2d Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3139 (U.S. Sept. 10, 1974) (No. 74-260). However, the language in *Dyer* v. *MacDougall* immediately following the portion quoted in Jenkins' Brief* supports the qualification to that principle

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* This Court in *Dyer* v. *MacDougall,* after the passage quoted at page 14 of Jenkins' Brief, went on to state the following:

> "Nevertheless, although it is therefore true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him. This is owing to the fact that otherwise in such cases there could not be an effective appeal from the judge's disposition of a motion for a directed verdict." 201 F.2d at 269.

expressed by the District Court here in its instruction on credibility (Tr. 220), namely that a jury should not be invited to draw factual inferences resting on no other evidence in the record than disbelief of a witness who has asserted the contrary.

But this question need not be resolved here. All of the testimony offered by the Government related to Jenkins' admissions and the circumstances surrounding them. Given the Government's burden of proof beyond a reasonable doubt,* any rejection of the testimony of the two agents would necessarily have resulted in the existence of a reasonable doubt. The drawing of factual inferences contrary to their testimony would have been irrelevant for acquittal,

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* This burden was imposed by the trial judge not only as to the elements of the crime but also on the voluntariness of Jenkins' confession. The trial judge instructed the jury that unless it was convinced beyond a reasonable doubt that Jenkins' confession was voluntary, it must ignore it (Tr. 222-23). The Court's instruction, given under 18 U.S.C. § 3501(a), was not objected to by the Government, but it greatly exceeded what the defendant was entitled to. The standard for judging the voluntariness of a confession, even for a determination of admissibility by the Court, is by the preponderance of the evidence, not beyond a reasonable doubt. *Lego* v. *Twomey*, 404 U.S. 477, 487-89 (1972). Further, the command of Section 3501(a) is that the trial judge "instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances", and the instruction here that the jury ignore the confession unless they found it voluntary beyond a reasonable doubt went far beyond what the statute requires. *See United States* v. *Adams*, 484 F.2d 357, 362 (7th Cir. 1973). Finally, although Section 3501(a) does permit an instruction on weight where an issue of voluntariness has been raised and rejected by the Court, it is inconceivable that an instruction under Section 3501(a) was required when (1) no motion to suppress was ever made and (2) nothing in the trial record even suggests that Jenkins' confession was involuntary. *Cf. United States* v. *Clark*, 498 F.2d 535, 537 (2d Cir. 1974); *United States* v. *Frazier*, 385 F.2d 901, 903 (6th Cir. 1967).

for if the jury did not affirmatively believe the agents' testimony a guilty verdict could not have been returned.

Finally, the District Court's charge repeatedly emphasized that defendant was presumed to be innocent.* Jenkins' argument in Point II that the charge "resulted in an unconstitutional violation of the presumption of innocence" (Br. at 16) is incomprehensible.

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* "As I told you during your selection as jurors, and in my instructions at the commencement of the trial, the law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with no evidence against him, and the law permits nothing but legal evidence presented before you as jurors to be considered in support of any charge against the defendant. The presumption of innocence remains with the defendant throughout the trial and throughout your deliberations until such time, if ever, as the jury is satisfied of guilt beyond a reasonable doubt. Thus the presumption of innocence alone is sufficient to acquit a defendant unless and until, after careful and impartial consideration of all the evidence in the case, you as jurors are unanimously convinced of the defendant's guilt beyond a reasonable doubt." (Tr. 209-10).

"At the beginning of my charge I told you that a defendant is presumed innocent and that that presumption remains with the defendant unless and until the jury is unanimously satisfied of guilt beyond a reasonable doubt." (Tr. 216-17).

"As I told you, a defendant is not required under our laws to prove his innocence. He is presumed to be innocent at all times through the entire trial unless and until the Government proves his guilt beyond a reasonable doubt." (Tr. 222).

POINT III

The District Court's rulings during cross-examination of the Government witnesses were within the scope of its discretion.

The District Court refused to allow cross-examination by Jenkins' counsel concerning the existence of recording equipment in the building where Jenkins was taken after his arrest (Tr. 73-74). Jenkins now argues in Point III that this was an error requiring reversal.

It is a basic principle that a trial judge has extensive discretion in controlling the scope of cross-examination. *See, e.g. United States* v. *Kahn,* 472 F.2d 272, 281 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973); *United States* v. *Dorfman,* 470 F.2d 246 (2d Cir. 1972), *cert. dismissed,* 411 U.S. 923 (1973). The District Court acted within the scope of its discretion in ruling that such questions were irrelevant to the issues: whether Jenkins' admission might have been memorialized differently in no way impeached the fact that they were made, reduced to writiing and signed by Jenkins.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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